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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/820,212

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Ulrich Kux

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EXAMINER

CAPPS, KEVIN J

ART UNIT

PAPER NUMBER

1617

DATE MAILED: 10/20/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/820,212

Applicant(s)

KUX ET AL.

Examiner

Kevin Capps

Art Unit

1617

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-25 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-25 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. ____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date 4/6/04.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. ____.
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: ____.

DETAILED ACTION

Status of the Claims

1. Claims 1-25 are pending and examined on the merits herein.

Priority

2. Applicant's claim of priority to PCT/EP02/10951 and German Patent Application 101 49 373.8 is acknowledged.

Information Disclosure Statement

3. The information disclosure statement (IDS) filed on April 6, 2004, is in compliance with the provisions of 37 CFR 1.97. Accordingly, the IDS is being considered by the Examiner.

Claim Rejections - 35 USC § 112

4. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

5. Claim 1 recites the limitation "said microemulsion gel" in line 3. There is insufficient antecedent basis for this limitation in the claim.

Claim Rejections - 35 USC § 103

6. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

7. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

8. Claims 1-25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Buisson (Applicant-cited reference on IDS: US 5,388,766) in view of Diec et al.

(Applicant-cited reference on IDS: WO 96/28132, using US 6,607,733 as the English-language functional equivalent).

9. Buisson teaches a high pressure dispensing and atomization system comprising a high viscosity fluid product, a container, and a pump sprayer for atomizing the fluid, said pump sprayer comprising a piston which pressurizes the fluid. Buisson teaches that the fluid is released through swirl type atomizer nozzles causing the fluid to rotate when released (claim 1; col. 4, line 39-col. 7, line 41). Buisson teaches that an operating pressure of at least about 690 kPa (0.69 mPa) is preferred, which overlaps the herein-claimed pressure of at least 0.7 mPa (col. 11, lines 16-27). Buisson teaches

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that the pump atomizer is for dispensing high viscosity fluid products such as, among other things, health and beauty care products (col. 10, line 58-67).

10. Buisson does not teach that the high viscosity fluid product in the atomization system is the oil-in-water emulsion antiperspirant composition of the instant invention.

11. Diec et al. suggest the oil-in-water emulsion antiperspirant composition of the instant invention. Specifically, Diec et al. teach an oil-in-water emulsion comprising an emulsifier at less than 20% by weight, and crosslinking substances containing at least one hydrophobic region which have an extension that is suitable for bridging the distance between the microemulsion droplets, wherein the emulsifier is selected from the group consisting of polyethoxylated and polypropoxylated emulsifiers, and wherein the microemulsion is prepared by mixing the components and varying the temperature so that the mixture passes through a phase inversion range (claim 1). Diec et al. teach that the microemulsion can be used in the formulation of deodorants and that "customary antiperspirant active compounds" can be incorporated into the compositions (col. 30, lines 37-44; col. 26, lines 49-52). Diec et al. exemplify the incorporation of the emulsifiers and aluminum chloride antiperspirant salts at concentrations within the herein-claimed ranges (Examples 1-8 and 26). Diec et al. teach that cosmetic deodorants comprising the microemulsion can be dispensed from pump devices (col. 26, lines 53-59).

12. It would have been obvious to the person of ordinary skill in the art at the time of invention to incorporate the oil-in-water emulsion antiperspirant composition of Diec et al. into the atomization system of Buisson to arrive at the instantly claimed invention.

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13. The person of ordinary skill in the art would have been motivated to incorporate the oil-in-water emulsion antiperspirant composition of Diec et al. into the atomization system of Buisson because Diec et al. teach that pump devices can be used to dispense the oil-in-water emulsion antiperspirant compositions and Buisson teaches that his pump device for atomizing viscous fluids can be used for dispensing health and beauty care products. The person of ordinary skill in the art would expect that the composition of Diec et al. could be successfully dispensed from the atomization system of Buisson because Buisson teaches that the system is designed for the purpose of dispensing such compositions.

Double Patenting

14. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

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15. Claims 1-25 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-4, 6, 8, and 9 of U.S. Patent No.

6,607,733 in view of Buisson (Applicant-cited reference on IDS: US 5,388,766).

16. As discussed above, '733 teaches oil-in-water emulsions comprising emulsifiers and crosslinkers at the herein-claimed concentrations.

17. The claims of '733 do not teach the incorporation antiperspirant salts into the emulsion, or incorporation of the emulsion into a pump atomizer.

18. As discussed above, Buisson teaches the pump atomizer of the instant invention.

19. It would have been obvious to the person of ordinary skill in the art to incorporate antiperspirant salts into the emulsion of '733, and to further incorporate the resulting antiperspirant microemulsion into the pump atomizer of Buisson to arrive at the instantly claimed product.

20. The person of ordinary skill in the art would have been motivated to incorporate antiperspirant salts into the emulsion of '733 because claim 6 of '733 suggests the incorporation of well known cosmetic or dermatological agents into the microemulsions, and antiperspirant salts, such as aluminum salts, are well known to the ordinary skilled artisan for use as cosmetic or dermatological antiperspirant agents. Aluminum salts are in fact exemplified in the specification of '733 as preferred additives for the dermatological formulations (Examples 1-8 and 26). Thus, the person of ordinary skill in the art would expect that antiperspirant salts could be effectively incorporated into the microemulsions of '733.

21. The person of ordinary skill in the art would have been motivated to incorporate the resulting antiperspirant microemulsion into the pump atomizer of Buisson because it is well known in the art that products are needed for dispensing and applying such dermatological compositions as in '733. The person of ordinary skill in the art would expect that the pump atomizer of Buisson could be used to dispense the antiperspirant microemulsion of '733 because Buisson teaches that the pump atomizer is for dispensing such compositions.

22. Claims 1-25 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-22 of copending Application No. 10/819,781 in view of Diec et al. (Applicant-cited reference on IDS: WO 96/28132, using US 6,607,733 as the English-language functional equivalent).

23. '781 teaches an antiperspirant product comprising an oil-in-water microemulsion and a pump atomizer, wherein the microemulsion comprises the emulsifiers and antiperspirants at the herein-claimed concentrations, and wherein the pump atomizer is identical to the instantly claimed invention.

24. '781 does not teach that the oil-in-water microemulsion further comprises crosslinkers.

25. Diec et al. teach that for oil-in-water emulsions comprising the herein-claimed emulsifiers at the herein-claimed concentrations, the addition of crosslinkers is preferred.

26. It would have been obvious to the person of ordinary skill in the art at the time of invention to incorporate the crosslinkers of Diec et al. into the oil-in-water emulsion of '781 to arrive at the instantly claimed invention.

27. The person of ordinary skill in the art would have been motivated to incorporate the crosslinkers of Diec et al. into the oil-in-water emulsion of '781 with a reasonable expectation of success because claim 5 of '781 allows for the addition of additives and Diec et al. teach that crosslinkers are preferred additives for oil-in-water emulsions.

This is a provisional obviousness-type double patenting rejection.

28. Claims 1-25 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 44 of copending Application No. 10/892,159.

29. Claim 44 of '159 teaches an atomizer pump container comprising an oil-in-water emulsion comprising the herein-claimed emulsifiers at the herein claimed concentrations, the herein-claimed antiperspirants at the herein-claimed concentrations, and polyols. Page 18 of '159 defines the polyols as crosslinkers.

30. '159 does not teach all of the herein-claimed concentrations of the polyols.

31. It would have been obvious to the person of ordinary skill in the art at the time of invention to optimize the concentration of the polyols in the microemulsion of '159 using routine experimentation to arrive at the instantly claimed compositions.

32. The person of ordinary skill in the art would have been motivated to optimize the concentration of the polyols in the composition of '159 with a reasonable expectation of

success because optimization of the concentration of known components in a dermatological formulation is a common practice in the art and is a matter of routine experimentation for the ordinary skilled artisan. Applicant's attention is directed to *In re Aller*, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955) which states, "Where the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation." See MPEP § 2144.05, "II. Optimization of Ranges".

This is a provisional obviousness-type double patenting rejection.

33. Claims 1-25 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-38 and 45-48 of copending Application No. 10/892,159 in view of Buisson (Applicant-cited reference on IDS: US 5,388,766).

34. '159 teaches an oil-in-water emulsion comprising the herein-claimed emulsifiers at the herein claimed concentrations, the herein-claimed antiperspirants at the herein-claimed concentrations, and polyols. Page 18 of '159 defines the polyols as crosslinkers. '159 also teaches methods of using the compositions.

35. '159 does not teach all of the herein-claimed concentrations of the polyols. Claims 1-38 and 45-48 of '159 do not teach the microemulsion as being in a pump atomizer.

36. As discussed above, the composition of '159 is not patentably distinct from the instantly claimed compositions because it is a matter of routine experimentation for the

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ordinary skilled artisan to arrive at the preferred concentrations of the components of the microemulsion.

37. As discussed above, Buisson teaches the pump atomizer of the instant invention.

38. It would have been obvious to the person to optimize the concentration of the crosslinkers in the compositions of '159 and to incorporate the composition into the pump atomizer to Buisson to arrive at the instantly claimed product.

39. The person of ordinary skill in the art would have been motivated to incorporate the antiperspirant microemulsion of '159 into the pump atomizer of Buisson because it is well known in the art that products are needed for dispensing such dermatological compositions as in '159. The person of ordinary skill in the art would expect that the pump atomizer of Buisson could be used to dispense the antiperspirant microemulsion of '159 because Buisson teaches that the pump atomizer is for dispensing such compositions.

This is a provisional obviousness-type double patenting rejection.

40. Claims 1-25 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-29 of copending Application No. 10/953,587 in view of Buisson (Applicant-cited reference on IDS: US 5,388,766).

41. '587 teaches oil-in-water emulsions comprising the herein-claimed emulsifiers, crosslinkers, and antiperspirants.

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42. '587 does not teach all of the herein-claimed concentrations of the components.

'587 does not teach incorporation of the emulsion into a pump atomizer.

43. For the reasons discussed above, the compositions of '587 are not patentably distinct from the instantly claimed compositions because it is a matter of routine experimentation for the ordinary skilled artisan to arrive at the preferred concentrations of the components of the microemulsion.

44. As discussed above, Buisson teaches the pump atomizer of the instant invention.

45. It would have been obvious to the person to optimize the concentration of the crosslinkers in the compositions of '587 and to incorporate the composition into the pump atomizer to Buisson to arrive at the instantly claimed product.

46. The person of ordinary skill in the art would have been motivated to incorporate the antiperspirant microemulsion of '587 into the pump atomizer of Buisson because it is well known in the art that products are needed for dispensing such dermatological compositions as in '587. The person of ordinary skill in the art would expect that the pump atomizer of Buisson could be used to dispense the antiperspirant microemulsion of '159 because Buisson teaches that the pump atomizer is for dispensing such compositions.

This is a provisional obviousness-type double patenting rejection.

Conclusion

47. No claims are allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kevin Capps whose telephone number is (571) 272-8646. The examiner can normally be reached on Monday-Friday, 7:30am-5pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sreeni Padmanabhan can be reached on (571) 272-0629. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

KC



SREENI PADMANABHAN
SUPERVISORY PATENT EXAMINER